THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JUNE 25, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

THE LAWS OF HOMICIDE—CHARACTER OF DECEASED AS TO VIOLENCE.—The very able and satisfactory opinion of Mr. Chief Justice Roberts delivered as the judgment of the Supreme Court of Texas, in the case of Horbach v. The State, will be read with interest. We have had occasion to examine the principal question discussed in this case somewhat critically, and we feel warranted in saying that in no case in the books, are the grounds on which such evidence is admitted, more clearly or logically enunciated. The decisions on the question are collected in full in Horrigan and Thompson's Cases on Self Defence, and are discussed by Dr. Wharton, in the second edition of his Law of Homicide, §§ 605–625. For this valuable opinion we are indebted to the courtesy of A. J. Peeler, Esq., Assistant Attorney-General of Texas.

ADMIRALTY LIENS FOR SUPPLIES IN HOME PORT.—Notwithstanding its length, we should not have been excused by a considerable portion of our readers, had we failed to print a decision of the Supreme Court of the United States, settling a question which has recently been much agitated among admiralty lawyers. The case of the Lotawana, deciding that under the general admiralty law of this country, a material-man has no lien for supplies furnished a vessel in her home port, is, next to the Topeka tax case, (*ante*, p. 156), perhaps the most important decision rendered by the supreme court at its last term. Without questioning its correctness, we have heard it sufficiently discussed to warrant us in conjecturing that it will prove unsatisfactory to a large number of admiralty lawyers, though that it will meet with the disapprobation of the larger number we can not say. At all events Congress no doubt has power to establish a uniform rule on this subject, with proper provisions for registration and constructive notice to third parties; and it seems desirable that it should do so without delay.

One point taken by Mr. Justice Bradley in the prevailing opinion, does not seem clear. He intimates that although a state may create a lien upon a vessel, yet it cannot enable its courts to proceed *in rem* against the vessel for its enforcement, but can only authorize the enforcement thereof by common law remedies, or by such remedies as are equivalent thereto; but that such liens may be enforced in the federal courts. That is to say, a state may create a lien, which *binds* the thing (for this is the meaning of the word lien), and yet have no power to enforce that lien against the *thing bound*, except so far as it may be done by the comity of the courts of a foreign jurisdiction.

This is certainly an anomaly in jurisprudence; and although Mr. Justice Bradley explains historically how it arose, yet the most logical conclusion would seem to be, that power to enforce a lien, by seizing and holding the thing bound by the lien, is inseparable from the existence of the lien. If the *res* cannot be seized, there is no lien in a proper sense—there is nothing which *binds*.

We shall publish the able dissenting opinion of Mr. Justice Clifford next week.

Regulation of Foreign Commerce—Power of Federal Circuit Courts to Enjoin State Boards of Immigration.

An act of the legislature of Louisiana, approved June 13, 1874, provides as follows:

Section 2. That a bureau of immigration shall be, and is hereby established in the city of New Orleans, for the purpose of supervising the landing of immigrants and the immigrant vessels arriving at the port of New Orleans, etc.

Section 3. That the bureau established by the second section of this act shall be under the charge of four commissioners to be designated as the commissioners of immigration, who shall be appointed by the governor of the state, by and with the advice of the senate, for the term of two years. * * It shall be the duty of said commissioners to provide for the maintenance and support of such of the persons, for whom commutation shall have been given, as hereinafter provided, or on whose account bonds shall have been given, as would otherwise become a charge upon any city, town or parish of this state, etc.

Section 4. That within twenty-four hours after the landing of any passenger or passengers from any ship or vessel arriving at the port of New Orleans from any of the United States, other than this state, or from any country out of the United States, the master or commander of the ship or vessel from which such passenger or passengers shall have been landed, shall make a report in writing on oath or affirmation to the chief of the bureau of immigration, at his office in the city of New Orleans, which report shall state the name, place of birth, last legal residence, age and occupation of every person or passenger who shall have landed from such ship or vessel, on her last voyage to said port, not being a citizen of the United States, and who shall have, within the last twelve months, arrived from any country out of the United States, at any place within the United States, and who shall not have paid the commutation money, or been bonded according to the provisions of this act; the same report shall contain a like statement of all such persons or passengers aforesaid as shall have been landed or supposed to land from any such ship or vessel at any place during such last voyage, or who shall have been put on board or suffered to go on board of any other ship or vessel or boat with the intention of proceeding to, and landing at the said city of New Orleans, or elsewhere within the limits of the state. The said report shall further specify whether any of the said passengers so reported are lunatic, idiotic, deaf, dumb, blind, infirm, maimed, or above the age of sixty years; also designating all such passengers as shall be under the age of thirteen, or widows having families, or women without husbands having families, with the names and ages of their families; shall further specify particularly the names, last places of residence and ages of all passengers who may have died during the said last voyage of said vessel. * * *

Section 5. That it shall be the duty of the commissioners of immigration, or the chief of the bureau, by an endorsement to be made on said report, to require the owner or consignee of the ship or vessel from which such persons were landed, to give a several bond to the people of the state, in a penalty of three hundred dollars, for any and every person or passenger included in said report, such bond being secured as hereinafter provided and conditioned; to indemnify and save harmless the commissioners of immigration and each and every city, town or parish in this state, from any costs which said commissioners or such city, town or parish shall incur for the relief or support of the person named in the bond, within five years from the date of such bond, and also to indemnify or refund to the said commissioners any expense or charge they may necessarily incur for the support or medical care of the persons named therein. * * * * * It shall be lawful for any owner or consignee, at any time within twenty-four hours after the landing of such persons or passengers from any ship or vessel in the port of New Orleans, except as in the section herein provided, to commute for the bond or bonds so required, by paying to the commissioners of immigration, or their appointed agent, the sum of two dollars for each and every passenger reported by him as by law required; the receipt of said sum by said commissioners or agent, shall be deemed a full and sufficient discharge from the requirements of giving bonds as above provided, but no owner or consignee shall be authorized to commute for the bond so required for any passenger arriving in the port of New Orleans, who may have to be sent to the Charity Hospital on account of illness, or for any passenger who, on examination,

shall be found either lunatic, or idiot, or dumb, blind, maimed or infirm, or above the age of sixty years, or widow with a child or children, or any person unable to take care of himself or herself without becoming a public charge. * * * * And in case that any owner or consignee of any vessel arriving at the port of New Orleans shall fail, neglect or refuse to give the bonds required by this act, or pay the commutation money as above set forth, within the time prescribed as aforesaid, said owners and consignees shall forfeit and pay unto the said commissioners of immigration the penalty of one hundred dollars in the case of each and every person or passenger for whom they shall fail, neglect or refuse to give bond or pay the commutation money as in this act set forth, which sum or sums may be sued for and recovered in any court of competent jurisdiction with judgment *in solido* against such owners and consignees.

Section 7 enacts that the moneys received by said commissioners for commutation or otherwise, not necessary for the maintenance of said bureau, shall be turned over to the treasurer of the Charity Hospital at the city of New Orleans, to be used for the sole benefit of the said Charity Hospital.

A bill in equity was filed in the federal circuit court at New Orleans, in November last, by the North German Lloyd, a German corporation, praying for an injunction against the commissioners of immigration, established by the above act, prohibiting them from doing "any act, or making any attempt, or authorizing or permitting any attempt" to exact the bond or commutation money, according to the provisions above recited. In support of this bill, it was claimed that the above statute, so far as it requires the giving of bonds, or the payment of commutation money, is unconstitutional and void, because it conflicts with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several states;" and also because it conflicts with the second paragraph of the tenth section of the same article, which ordains that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The case was recently heard before Mr. Circuit Judge Woods, and he has made a decree "that the commissioners of immigration be perpetually enjoined and prohibited from exacting from the complainant, or from the master or consignee of any of complainant's vessels, the bond or commutation therefor," required by the above statute. No written opinion was delivered—a circumstance much to be regretted; since from a fact not hitherto named, the case assumes an importance which it would not intrinsically possess. That fact is, that the Supreme Court of Louisiana had already passed upon the above statute, in a case said to be reported in 26 La. An. 29, and had decided that it did not conflict with the constitution of the United States. The stress of the case, then, consists in the fact that after the Supreme Court of Louisiana, consisting of a bench of several judges, had declared this law constitutional, and a reasonable exercise of the police power, a single federal judge in effect reverses that decision, and launches forth the process of his court in support of his own ruling. It should seem that the appropriate, if not the exclusive mode, of testing the constitutionality of state laws of this character, ought to be by a writ of error from the Supreme Court of the United States, to the state tribunal of last resort, after this tribunal has adjudged in favor of the validity of such laws. In speaking of this subject, Mr. Justice Cooley says:

State legislation in violation of the 14th amendment, or of any other provision sustained by a state court of the last resort, may be set aside by the federal supreme court on appeal, as provided by the judiciary act; *but when general original jurisdiction to supervise and review state statutes shall be conferred on the federal judiciary, an innovation will be made in our system, which ought not to be made without careful consideration and deliberate intention.**

We do not venture the opinion that the jurisdiction exercised by Mr. Circuit Judge Woods in this instance, does not exist. A jurisdiction not entirely dissimilar, was exercised last year by the federal circuit court, for the district of California, in the case of Ah Fong (1 CENT. L. J. 516), which, in effect, reversed the Supreme Court of California, and discharged from custody the petitioners, a number of Chinese women, whom the former court had ordered sent back to China. But if such jurisdiction does exist, it is a matter which would seem to demand the earnest attention of the legal profession and of the country. It is well known that the political party in power has shown a disposition, whether wisely or unwisely we do not say, to push the jurisdiction of the federal circuit court to its utmost limit. Such, we understand, was the avowed purpose of the recent act of Congress increasing the jurisdiction of that court. (*Ante*, p. 209.) Whatever may be said concerning the propriety of that act, the manner in which it was enacted, deserves severe reprehension. Wholly unknown to the bench, the bar, or the public, it was concocted in the judiciary committee of one of the houses of Congress, was rushed through Congress at the close of its session, very few members, we have been told, being aware of its true import. Even the Judges of the Supreme Court of the United States had no intimation of such a measure until it had passed and had received the President's signature. Nor did the public at large have any knowledge of it, until one of the justices of that court caused it to be published in the Washington Chronicle. Such a mode of legislating on a subject of such grave importance resembles more nearly the conduct of a den of conspirators against the public welfare, than what should be expected in the representatives of a free people. In England such measures are seldom passed until agitated during an entire session of parliament, and frequently not without lying over from session to session; nor until commissions have been appointed, volumes of testimony taken, the judges and the bar consulted, and the public fully advised and heard.

What we have said is not said out of a desire to criticise Mr. Circuit Judge Woods' decision; for, as we have already stated, we do not criticise it — but rather out of a desire to point out a manifest tendency towards the enlargement of the jurisdiction of the federal courts, both by federal legislation, and by some of those courts assuming jurisdiction in doubtful cases. Such extensions of federal jurisdiction may, indeed, be beneficial; but on the other hand, it is possible that they may be steps towards the gradual extinguishment of local self-government — steps "on which we must fall down, or else o'erleap," at no distant day in the future.

*Cooley's Constitutional Limitations, page 574, note.

—MR. ATTORNEY-GENERAL PIERREPONT has issued the following order, reorganizing the bureaus, in the department of justice: "As heads of bureaus the following are designated by the attorney-general: Bureau of the Supreme Court, assistant attorney-general not yet appointed. Bureau of the court of claims, assistant attorney-general, Thomas Simons. Bureau of legal investigations, Alex. J. Bentley. Bureau of official correspondence, A. R. Dutton. Bureau of the chief clerk, A. J. Fall; the chief clerk, having resigned to take effect on the 30th instant, no assignment is made. Bureau of criminal law, Edward R. French."

Of What Courts Will Take Judicial Notice.*

[Concluded from last week.]

3. *Legislative Bodies.*—The English courts take judicial notice of the legal privileges of the House of Commons without regard to the adverse opinion of the house (Denman in Stockdale v. Hansard, 9 Ad. & El. 107); and of the privileges of members of the house (Cassidy v. Steuart, 2 Man. & Gr. 437); also of the commencement, prerogatives and sessions of Parliament (Rex v. Wilde, 1 Lev. 296, and cited in note 31, 1 Doug. 93); the order of proceedings and its committees (Lake v. King, 1 Saund. p. 133), and the place of holding its sessions (Birt v. Rothwell, 1 Lord Raymond, 210 and 343). But the journals of Parliament are not records, and can not weaken or control a statute which is a record and to be tried by itself. King v. Arundel, Hobart, 109; and the chancellor says (p. 111), "The journal is of good use for the observation of the generality and materiality of the proceedings and deliberations as to the three readings of any bill, the intercourse between the houses, and the like; but when the act is passed, the journal is expired." Whether, if it became material to inspect the journals, the court would do it without the proper allegation and proof, or whether it would judicially notice facts appearing in the records, without evidence in regard to them, is not distinctly stated. If, however, "when the act is passed the journal is expired," it would seem to be below the judicial notice of the court.

In Illinois it is held that the journals of its legislature, although public records, are not within the judicial knowledge of the court. Grob v. Cushman, 45 Ill. 119; Ill. C. R. R. Co. v. Wren, 43 Ill. 77. The holding in Indiana is to the same effect. Coleman v. Dobbins, 8 Ind. 156. In Michigan it seems to be otherwise. People v. Mahaney, 13 Mich. 481.

4. *Officers of State.*—Tribunals will take official notice of the accession of the chief executive of the nation, or of the state under whose authority they act, and of their powers and duties. 1 Greenl. Ev. § 6; Hizer v. State, 12 Ind. 330; State v. Williams, 5 Wis. 308; Lindsay v. Att'y-Gen'l, 33 Miss. 508. This notice extends to all public state officers, as auditor, treasurer, etc., and implies, where a seal is not required, a recognition of their signatures, although not that of their deputies. The court will also take notice of the day of a general election and the officers to be voted for (State v. Minnick, 15 Iowa, 123), but not the election day in another state. Taylor v. Rennie, 35 Barb. 272.

Judicial notice will be taken of county officers within the territorial jurisdiction of the court, and their signatures (Wetherbee v. Dunn, 32 Cal. 106), including registers of counties (Scott v. Jackson, 12 La. Ann. 640), and the rule is applied to a levee tax-collector. Templeton v. Morgan, 16 La. Ann. 438. In Wetherbee v. Dunn, the court placed the recognition of county officers upon the ground "that courts will take notice of what ought to be generally known within the limits of their jurisdiction."

5. *Courts and their Officers.*—Courts, within the political authority under which they act, will take notice of all other courts of general jurisdiction, their judges and seals and course of proceeding, what courts possess general jurisdiction, and its extent. 1 Starkie Ev. 445 n. a. All this is matter of law, and much of it of such notoriety as to be known to all. As to the rules of court, they are not judicially known by other courts, although it was held in Maryland (Contee v. Pratt, 9 Md. 73,) that an appellate court was bound, judicially, to know the rules of the inferior court. The opposite view was afterwards taken by the same court. Cherry v. Baker, 17 Md. 75; Scott v. Scott, id. 78. The rules of court, though for the due order of proceeding obligatory upon suitors, are not public law, neither are they so notorious as to be known to all, and upon principle those of other courts should be brought to the knowledge of a trial court by pleading and evidence, and those of the trial court to that of an appellate court by incorporating them in a bill of exceptions, and such is believed to be the general practice. See O'Conner v. Koch, 56 Mo. 259. The existence, jurisdiction and practice of inferior courts can be judicially known to the courts generally, only as established by law, but the courts of general jurisdiction, in the several counties, will take notice of the subordinate or inferior courts within the county, as of those of justices of the peace (Graham v. Anderson, 42 Ill. 514), and of the signatures of the judges and justices.

Courts will take notice of their own officers, but not of those of other courts (Norvell v. McHenry, 1 Mich. 227,) and their signatures (Anderson v. Bell, 9 Cal. 315; State v. Postlewaite, 14 Iowa, 446), including the roll of their attorneys (1 Chitty Pl. 220), but will only notice the signatures of attorneys in their professional acts (Masterson v. LeClaire, 4 Minn. 163); will judicially know their official character, if no designation of it is added to their signatures (Thompson v. Haskell, 21 Ill. 215); will know when their terms expire (Ragland v. Wynn, 37 Ala. 32), and will treat sheriffs as officers *de facto* when their acts are called in question. Alexander v. Burnham, 18 Wis. 199. The acceptance of the office of a deputy sheriff will not be noticed (St. Bk. v. Curran, 10 Ark. 142), nor the official character of the U. S. deputy marshal. Ward v. Henry, 19 Wis. 76.

6. *Treaties, &c.*—The U. S. courts will notice treaties with foreign governments and the public acts and proclamations of those governments in carrying them into effect. U. S. v. Reynes, 9 How. 127. Treaties of the United States, as well as laws, are declared to be the supreme law of the land by which the judges of every state are bound (U. S. Const. Art. VI.), and they will all take judicial notice of their provisions. Baby v. Dubois, 1 Blackf. 255. And the Minnesota courts take judicial notice of the fact that a certain treaty between the United States and an Indian tribe was made long before its ratification. Carson v. Smith, 5 Minn. 78.

7. *Of Proclamations* of the highest executive authority. Dunning v. New Albany, 2 Ind. 437; 1 Starkie Ev. 8 Am. Ed. 735, n. q.

8. *Of Public Surveys* and legal subdivisions of the public land. Atwater v. Schenck, 9 Wis. 160; Hill v. Bacon, 43 Ill. 477; Mossman v. Forrest, 27 Ind. 238; Wright v. Phillips, 2 Greene, (Iowa), 191.

9. *Of Official Seals.*—A Notary public is an officer recognized throughout the commercial world, and his seal will be judicially noticed by all courts. But such seal will give no validity to acts not done under the *lex mercatoria.* 2 Phil-

*The substance of this article will appear in a work on Code Pleading which is being prepared by Hon. P. Bliss, late a Judge of the Supreme Court of Missouri, and Dean of the Law Faculty of the University of Missouri.

lipps Ev. 4 Am. Ed. 260, C. & H. n. 324, and 594, C. & H. n. 479. Hence in such case the authority should be pleaded. In case, however, the law of the state in which the seal is affixed authorizes the act certified to, the seal will be treated with the same respect as in certificates of protest. The national seals of all countries are universally recognized, and the seals of the several secretaries of state and territories, are supposed to be known to the courts of all the states and of the United States and territories. As to national seals, the courts will only take judicial notice of those whose nationality has been recognized by the federal government (3 Wheat. 610; 4 Id. 278); in others, the seals must be proved by competent testimony (*supra*); the seals of the superior courts of England, and of all courts established by act of Parliament, from themselves (2 Starkie, 4 Am. Ed. 346), and the same rule holds in the several states. But the seal of a foreign court, not acting under the laws of nations, does not prove itself. Ibid., 418-19, n. The courts of all countries, however, will judicially notice the seals of courts of admiralty as courts of the law of nations. Ibid., 418-19, n. Under the provision of the federal constitution, directing that full faith shall be given in each state to the judicial proceedings of other states, and authorizing Congress to prescribe the manner in which they shall be proved, Congress has provided that such proceedings shall be proved and admitted in any court within the United States, by attestation of the clerk, with the seal annexed, followed by a certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form. Thus, while the seal of the courts of other states is not judicially noticed, the signature of the judge is, and his certificate proves the seal.

At common law the seal of no municipal or other corporation was judicially known, except that of the city of London. 1 Phil. Ev. Ch. x. § 1.

It should be remarked that questions in regard to the judicial notice of official seals will seldom interest the pleader as such, it being almost exclusively a question of evidence.

10. *Civil Divisions Created by Law.*—1 Stark. Ev. 735, 8 Am. Ed. n. q. The courts will take judicial notice of the existence and boundaries of counties, and townships and towns created by law. State v. Jackson, 39 Me. 291; Stephenson v. Doe, 8 Blackf. 508; Buckinghouse v. Gregg, 19 Ind. 401. But when the time of their organization becomes material to be known, and they are created, not by a public act, but by local authorities acting under a general law, the court can not know such time (Buckinghouse v. Gregg, *supra*); it must be stated and proved. Nor when there has been a division of a county by an act which does not show to which division a particular town is attached, can the court know to which it belongs. State v. Jackson, *supra*. The courts will notice the existence and boundaries of judicial districts and the counties of which they are composed (State v. Woorell, 25 Mo. 205), and that a judicial district is within a county, although composing a part of it only. People v. Robinson, 17 Cal. 363. There is a difference in principle between the area and boundaries of civil divisions within the state, and the existence of place as geographical facts. The former are known only so far as they are evidenced by public statutes, and so with the fact of organization, as the names of places adopting a general act concerning incorporations (Johnson v. Com. Council, 16 Ind. 227), and the time of dividing and erecting counties under a general law (Buckinghouse v. Gregg, 19 Ind. 401), which can not be judicially known.

11. *Existence and Location of Places.*—The courts where places are referred to in the pleadings, will take notice of their existence and general location (Ind. R. R. Co. v. Stephens, 28 Ind. 429), without an averment and proof of the fact, and if within the state will know to what county they belong (Ind. R. R. Co. v. Carr, 15 Ind. 42; Martin v. Martin, 51 Me. 366; Hite v. State, 9 Yerg. (Tenn.) 381; Vanderwerker v. People, 5 Wend. 530; Harding v. Strong, 42 Ill. 148); but not the precise distance from one place to another (Goodwin v. Appleton, 22 Me. 453); and will know the existence of school districts organized according to law. Portsmouth Liv. Co. v. Watson, 10 Mass. 91; Swails v. State, 4 Ind. 516. But when foreign places are referred to, the pleader must give the state or county in which they are situate, or the court will suppose that some place by the name is intended within the state, as, when New York and New Orleans are spoken of simply by the city name, the court will not assume that they are in the states of New York and Louisiana (Whitlock v. Castro, 22 Texas, 108); and the words "at Virginia to wit, in Greene Co.," will not be held to mean the state of Virginia, but some place in Greene county (Richardson v. Williams, 2 Porter, (Ala.) 239); nor will a commission from a Missouri court, to take depositions in New Orleans, with a return by a magistrate of New Orleans, be judicially understood to be directed to and returned from New Orleans in the state of Louisiana. Ober v. Pratte, 1 Mo. 80. The allegation "in the city of Janesville," without naming county or state, means in the state where the pleading is made. Woodward v. Chicago, etc., R. R. Co., 21 Wis. 309.

12. *The General Geography of the Country* –Mossman v. Forrest, 27 Ind. 233. And its great geographical features, as its lakes, rivers and mountains, will be judicially noticed (Winn. Lake Co. v. Young, 4 N. H. 420); as the navigable rivers of the country (Neaderhouser v. State, 28 Ind. 257); the falls of the Ohio (Cash v. Auditor, 7 Ind. 227); that the river Mersey in England is salt water, and that the tides rise high in it (Whitney v. Gauche, 11 La. Ann. 432); the great distance between Raleigh, N. C., and a given county in Tennessee. Park v. Larkin, 1 Tenn. 17.

13. *The General course of Nature* will be noticed, as the period of gestation (Rex v. Luffe, 8 East, 202); that certain crops mature at certain seasons (Floyd v. Ricks, 14 Ark. 286); but as the time of maturity greatly varies in different parts of Illinois, and in different seasons, the court will not notice the precise time. Facts of unvarying occurence will be noticed, but not the changes of climate and seasons. Dixon v. Niccolls, 39 Ill. 372. In passing upon old surveys, C. J. Bibb, remarks of a scientific fact involved: "The variation of the magnetic meridian from the true meridian, is recognized by statutes and by the former opinions of this court. That such variation was eastwardly of the true meridian at the time of the original survey (1774), that it had progressed eastwardly from that time until the time of making the survey preparatory to making the decree now complained of, is one of those principles acknowledged by scientific men which this court

is bound to notice as relative to surveys, as much as they would be bound to notice the laws of gravitation, the decent of the waters, the diurnal revolution of the earth, or the changes of the seasons." Bryan v. Beckley, 6 Litt. (Ky.) on p. 95. But Bland, Chancellor, in Maryland, held that the fact that the concentric layers of the trunk of a tree marked its age, was not sufficiently established to be judicially noticed; but if the fact were proved as to one, it would be inferred in regard to others similarly circumstanced. Patterson v. McCausland, 3 Bland (Md.), 69.

14. *The Ordinary Computation of Time* will be noticed (1 Stark. Ev. 8 Am. Ed. 735, n. q.; 1 Phil. Ev. Ch. x. § 1); as that a certain day of the week did not coincide with a given day of the month (6 Viner Ab. 441, Court, 8); or that a certain day of the month is Sunday (Page v. Faucet, 1 Croke, 227; Hoyle v. Cornwallis, 1 Strange, 381; Hanson v. Shackleton, 4 Dowl. 48); also Christmas and other legal holidays, and the custom of merchants in regard to the maturity of paper falling due on such days (Sasson v. Farmers' Bk. 4 Md. 409); the order of the month and the number of days in each. 1 Phil. Ev. Ch. x. § 1.

15. *The Coinage of the Country.*—(U. S. v. Burns, 5 McLean, 23); that "a U. S. gold coin of the value of ten dollars" is an Eagle. Dailey v. State, 10 Ind. 536.

16. *The Legal Weights and Measures.*—1 Stark, Ev. 446.

17. *The Popular Meaning of Words* and phrases (6 Viner Ab. 491, Court. 6, 7; Townshend on Slander, etc., 169, n. n.); as what was understood in Kentucky at different periods by the words "currency and money" (Lampton v. Haggard, 3 Monr. 149; Jones v. Overstreet, 4 Id. 547; 1 Stark. Ev. 8 Am. Ed. 735, n. q.); but not the precise value of bank notes, at a particular time. (Feemster v. Ringo, 5 Monr. 336); also in Tennessee (Shaw v. State, 3 Sneed, 86); the known abbreviation of the first name as Jas. for James (Stephen v. State, 11 Geo. 241); or Christ. for Christopher (Weaver v. McElhenon, 13 Mo. 89); that the word "cattle" includes horses, mares, etc. (State v. Hambleton, 22 Mo. 452; State v. Clifton, 24 Id. 376); the signification of the usual dollar sign. Fulenwider v. Fulenwider, 53 Mo. 439. In libel and slander, if the meaning of the words charged is ambiguous or not commonly understood, it must be set out by inuendo. Townshend on Libel, p. 169–70, n. 2.

18. *Matters of Public Notoriety*; as that American corporations have been in the habit of openly making contracts in England (Bk. of Augusta v. Earle, 13 Peters on p. 590); the common source of title to land, as that the public lands in a certain county are held under the United States (Lewis v. Harris, 31 Ala. 689); that slavery was abolished by the war before its abolition by ordinance (Ferdinand v. State, 39 Ala. 706); that certain states recognized the existence of slavery (Rennick v. Chloe, 7 Mo. 197); that a certain price charged for labor is extortionate, but without knowing what the price should be (Bell v. Barnet, 2 J. J. Marshall, 516); that a certain currency was depreciated, but not how much (Bell v. Barnet, 2 J. J. Marshall, 516; Modawell v. Holmes, 40 Ala. 391); that the Methodist Episcopal church was separated and became two church organizations. Humphrey v. Burnside, 4 Bush. (Ky.) 215. The general doctrine is thus stated by the Supreme Court of California: "Courts will take notice of matters of public history affecting the whole people." Payne v. Treadwell, 16 Cal., on p. 231; and was early stated by that of Kentucky, as follows: "Transactions and objects which necessarily connect themselves with, and form a part of the general history or geography of the country, ought to be taken notice of." Hart v. Bodley, Hardin, 98. The distinction between historical or notorious facts of which the court will take notice, and those historical facts which must be proved, is not very clear. The New York Court of Appeals in McKinnon v. Bliss, 21 N. Y. 206, hold that there must be competent evidence of historical facts, and that a local history, especially if the author be living, is not admissible, quoting Morris v. Lessee of Harmer's Heirs, 7 Peters, 554, that "historical facts of general and public notoriety may be proved by reputation, and reputation may be established by historical works of known character and accuracy." Facts that require proof are not judicially noticed, but this particular question is more one of evidence than of pleading.

By an inspection of the points and authorities which have been given, and which might have been greatly multiplied, the pleader will perceive that the following principles run through, and in effect govern them all, to-wit:

Matters of which the court takes judicial notice are, 1st, matters of public law which all are presumed to know; 2nd, matters so notorious as to be supposed to be known to all; and 3rd, matters peculiarly within the cognizance of the particular court. There is a general, though not a perfect harmony in the cases, and quotations under some of the side-heads could have been extended, and perhaps profitably so; but it is believed that enough have been given to materially aid the young practitioner, especially if he is capable of reasoning from the general principles that underlie them. There will always be room for doubt as to what matters are so notorious that all intelligent persons ought to be informed in regard to them, and this applies especially to matters of history and general geography, especially of foreign countries. I do not think that in its application the law in this regard is well settled. Certain geographical facts are assumed to be known, but are all? A carrier makes a contract to transport merchandise to any point that shall be designated upon a certain navigable river. The plaintiff designates a place, say a city upon some of the rivers of distant American, or perhaps European states, according to the contract. The pleader sets out the contract, the place designated, and the default of the carrier, who is assumed to have landed the property at some other place. Will the court take judicial notice that the river is navigable at all; that the place designated is on the river; and that it was navigable at that place? Should not these facts be alleged and proved? And what is the difference between the judicial cognizance of such facts by the courts of international, and those of municipal law? And so of historical facts, some are recent, pertain to domestic history, and are supposed to be known by all. But where is the line? Will our courts take notice of the surrender of Cornwallis, of the battle of New Orleans, of Lee's surrender, and their dates, and not of the battle of Hastings, or of Waterloo? Are all or any of these, facts that may be put in issue? And of what class of historical facts will the court take notice?

P. Bliss.

St. Louis, Mo., June 1, 1875.

Maritime Law — Lien for Supplies in Home Port.

THE LOTAWANA.

Supreme Court of the United States, October Term, 1874 — Opinion Delivered May 3, 1875.

1. **General Maritime Law—How Far Operative in this Country.**—Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usuages thereof. It has no inherent force of its own.

2. ——. **Differs in Different Countries.**—In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries, without affecting the general integrity of the sytem as a harmonious whole.

3. ——. **Constitutional Interpretation—Meaning of the Words "Admiralty and Maritime Jurisdiction."**—The general system of maritime law which was familiar to the lawyers and statesmen of this country when the constitution was adopted, was intended, and referred to when it was declared in that instrument, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.

4. ——. **Limits of Maritime Law and Jurisdiction a Judicial Question—Tests of those Limits.**—The question as to the true limits of maritime law and admiralty jurisdiction, is exclusively a judicial question, and no state law or act of Congress, can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

5. ——. **The Same.**—The decisions of this court, illustrative of these usages and giving construction to the laws and constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

6. ——. **No Lien for Supplies in Home Port.**—It is settled by repeated adjudications of this court, that material-men, furnishing repairs and supplies to a vessel in her home port, do not acquire thereby any lien upon the vessel by the general maritime law, as received in the United States.

7. ——. **Changes in Law can only be made by Congress.**—Whilst it can not be supposed that the framers of the constitution contemplated that the maritime law should remain unchanged, the courts can not change it; they can only declare it. If within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department.

8. ——. ——. **Under Power to Regulate Commerce.**—*Semble*, That Congress, under the power to regulate commerce, has authority to establish a lien on vessels of the United States in favor of material-men, uniform throughout the whole country.

9. **When State Legislation is Competent.**—In particular cases, in which Congress has not exercised the power of regulating commerce, with which it is invested by the constitution, and where the shbject does not in its nature require the exclusive exercise of that power, the states, until Congress acts, may continue to legislate.

10. **State Liens Valid, but enforceable in Federal Courts.**—Hence, liens granted by the laws of a state in favor of material-men for furnishing necessaries to a vessel in her home port in said state, are valid, though the contract to furnish the same is a maritime contract, and can only be enforced by proceeds *in rem* in the District Courts of the United States.

11. **Lien on Fund Enforceable under 43d Rule.**—Any person having a specific lien on, or vested right in, a surplus fund in court, may apply by petition for the protection of his interest under the 43d admiralty rule.

12. **Liens for Supplies furnished in Home Port—Libel on Mortgage—Case in Judgment.**—Separate libels were filed in 1871, against a steamboat for wages, for salvage, for supplies furnished at her home port, and for the amount due on a mortgage: *Held*, On the evidence, that the lien for supplies had not been perfected under the state law; and, if it had been, that the libels for such supplies could not be sustained prior to the recent change in the 12th admiralty rule: *Held*, also, That the libel upon the mortgage could not be sustained as an original proceeding, but that the mortgagees having petitioned for the surplus proceedings of the vessel, were entitled to have the same applied to their mortgage.

Appeal in admiralty from the Circuit Court, for the District of Louisiana.

The libel in this case was filed in the District Court of the United States, for the district just above mentioned, on the 10th day of June, 1871, by William Doyle and another, against the steamer Lotawana, of New Orleans, for mariner's wages. The vessel being seized, libels of intervention were afterwards filed by various parties, some for mariner's wages, some for salvage services, some for supplies, materials and repairs furnished in the port of New Orleans, for the use of the steamer. On the 20th day of June, 1871, Catharine Rodd, administratrix, together with several commercial firms of the city of New Orleans, filed a libel of intervention, by which they set up a mortgage on the vessel, given to them by the owner, on the 20th of may, 1871, and duly recorded in the custom house on the 22d of May, to secure the payment of various promissory notes of the same date, given to the said libellants by the said owner, and amounting to more than $14,000.

The steamer, up to the 16th of May, had been engaged in the river trade, on the Mississippi and Red rivers, between New Orleans and Jefferson, in Texas, and was laid up for repairs at New Orleans on that day. Most of the claims for wages and supplies arose before the date of the mortgage, although some arose afterwards. The steamer was sold for $7,500, and, after deducting expenses of sale, costs, salvage and wages of mariners (which were admitted to have the preference), there remained a surplus of $4,644.42, which the district court decreed to be paid *pro rata* to the mortgage creditors, to the exclusion of the claims for repairs and supplies. This decree was reversed by the circuit court, on appeal, and the surplus was decreed to be paid *pro rata* to the claimants for repairs and supplies, to the exclusion of the mortgage creditors, the amount not being sufficient to pay either class of creditors in full. From the latter decree an appeal was taken to this court.

The principal question presented by the appeal, therefore, was whether the furnishing to a vessel on her credit, at her home port, needful repairs and supplies, created a maritime lien. If it did, such lien would take precedence of a mortgage given for the payment of money generally, and the decree must be affirmed. If it did not, the decree was to be reversed, unless the appellees could sustain themselves on some other ground.

It was also asserted by the appellees, that by the law of Louisiana they had a privilege for their claims giving them a lien on the vessel and her proceeds, which lien, though not strictly a maritime one, the court was bound to enforce.

This case was twice argued, once at December term, 1873, by Mr. T. J. Semmes, for the appellant, and Messrs. J. A. Grow and L. M. Day, for the appellees; and now, at this term, October, 1874, by Mr. R. Mott, for the appellant, and Mr. J. A. Grow, for the appellees, and by Mr. W. W. Goodrich, in favor of the lien for supplies furnished a vessel in her home port, and by Mr. William Allan Butler and Mr. Andrew Boardman, in opposition to such lien.

Mr. Justice BRADLEY delivered the opinion of the court.

The principal questions raised in this case, were decided by this court adversely to the lien more than fifty years ago, in the case of The General Smith, reported in 4 Wheaton, 438, and that decision has ever since been adhered to, except occasionally in some of the district courts. A solemn judgment relied on so long by the commercial community as a rule of property and the law of the land, ought not to be overruled except for very cogent reasons. If, however, in the progress of investigation, and with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency to the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law. The additional security which has been extended to bills of sale and mortgages on ships and vessels since the passage of the act for recording them in the custom house; and the confidence with which purchasers and mortgagees have invested money therein, under the existing course of decisions on this subject, have placed a large amount of property at undue hazard, if those decisions may lightly, or without grave cause, be disturbed.

The ground on which we are asked to overrule the judgment in the case of The General Smith, is that by the general maritime law,

those who furnish necessary materials, repairs and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well when furnished in her home port, as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or laws of war, which have the effect of law in no country, any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of the Union, also presents an analogous case. It is the basis of all the state laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist, either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things, wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and ground work of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications, suited to its locality and genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them, arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference, corresponding to the respective territories, climates, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any indepedent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens that, from the general practice of commercial nations, in making the same general law the basis and ground-work to their respective maritime systems, the great mass of maritime law, which is thus received by these nations in common, comes to the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port, where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, can not seriously affect the harmony and consistency of the common maritime law which each adopts and observes.

This view of the subject does not, in the slightest degree, detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon the just and logical grounds upon which it is accepted, and, with proper qualifications, received with the binding force of law in all countries.

The proposition, therefore, that by the general maritime law a lien is given in cases of the kind now under consideration, does not advance the argument a single step, unless it be shown to be in accordance with the maritime law as accepted and received in the United States. It certainly has not been the maritime law of England for more than two centuries past; and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treatises on maritme law, or the codes or ordinances of any particular country.

That we have a maritime law of our own, operative throughout the United States, can not be doubted. The general system of maritime law, which was familiar to the lawyers and statesmen of the country when the constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law adopted? The constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law, as expounded in the treatises, or only the limited and restricted system which was received in England; or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the constitution attempt to draw the boundry line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase, "admiralty and maritime jurisdiction," is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other, or with foreign states.

The question is discussed with great felicity and judgment by Chief Justice Taney, delivering the opinion of the court in the St. Lawrence, 1 Black, 526-527, when he says: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the constitution to the federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them, the extent of the jurisdiction conferred depending very much upon the

character of the government in which they were created, and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our goverment, where separate and distinct specified powers of sovereignity are exercised by the United States, and a state independently of each other, within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered. without being able to fix with precision its definite boundaries; but certainly no state law can enlarge it; nor can an act of Congress, or rule of court, make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty aud maritime jurisdiction was granted to the federal government."

Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on the ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The question as to the true limits of maritime law and admiralty jurisdiction, is undoubtedly as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed, but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court, illustrative of these usages, and giving construction to the laws and constitution, are especially to be considered, and when these fail us, we must resort to the principles by which they have been governed.

But we must always remember that the court can not make the law, it can only declare it. If within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It can not be supposed that the framers of the constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the larger portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication.

On this subject the remarks of Mr. Justice Nelson, in delivering the opinion of the court in White's Bank v. Smith, 7 Wallace, 655, 656, (which established the validity and effect of the act respecting the recording of mortgages on vessels in the custom-house), are pertinent. He says: "Ships or vessels of the United States are creatures of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1st, 1789, and those which after the last day of March, 1793, shall be registered or enrolled in pursuance of the act of 31st of December, 1792, and must be wholly owned by a citizen or citizens of the United States, and to be commanded by a citizen of the same." * * * * "Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction." This case was subsequently affirmed by Aldrich v. Ætna Company, 8 Wallace, 491.

Be this, however, as it may, and whether the power of Congress is or is not sufficient to amend the law on this subject (if amendment is desirable), this court is bound to declare the law as it now stands. And according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications of this court before referred to, which it is unnecessary to review, are conclusive on the subject, and we see no sufficient ground for disturbing them.

This disposes of the principal question in the case.

But it is alleged by the appellees that by the law of Louisiana, they have a privilege for their claims, giving them a lien on the vessel and her proceeds; and that the court was bound to enforce this lien in their behalf, though not strictly a maritime lien.

On examining the record, however, it appears that the appellees never caused their lien (if they had one) to be recorded according to the requirements of the state law. By the 123d article of the constitution of Louisiana, adopted in 1869, it is declared that "no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated." And an act of the legislature passed since that time adopts the very terms of the constitutional provision. And a further act provides, that if the privilege be not in writing, the facts on which it is based must be stated in an affidavit, which must be recorded. Revised Civil Code, articles 3,273, 3,274, 3,093. None of these requisites having been performed, no lien can be claimed under the state law. But if there were any doubt on this subject, the case of the appellees is met by another difficulty. The admiralty rule of 1859, which precluded the district courts from entertaining proceedings *in rem* against domestic ships for supplies, repairs, or other necessaries, was in force until May 6th, 1872, when the new rule was promulgated. Now, this case was commenced in the district court a year previous to this, and final judgment in the district court was rendered two months previous. It is true that the judgment of the circuit court on appeal was not rendered until the third day of June, 1872, but if the new rule had, at that time, been brought to the attention of the court, it could hardly have been applied to the case in its then position. All the proceedings had been based and shaped upon other grounds and theories, and not upon the existence of that rule. It would not have been just to the other parties to apply to them a rule which was not in existence when they were carrying on the litigation.

As to the recent change in the admiralty rule referred to, it is sufficient to say, that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any

new lien, which of course this court could not do in any event, since a lien is a right of property and not a mere matter of procedure.

Had the lien been perfected, and had the rule not stood in the way, the principles that have heretofore governed the practice of the district courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material men to file a libel against the vessel or its proceeds. The Gen. Smith, 4 Wheat. 438; Peyroux v. Howard, 7 Pet. 324; The Orleans v. Phœbus, 11 Pet. 175; The St. Lawrence, 1 Black, 522. It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation. State laws, it is true, can not exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they can not alter the limits of that jurisdiction, nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws; for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent thereto. But the district courts of the United states, having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws. Cases, *supra*. The practice may be somewhat anomalous, but it has existed from the origin of the government, and perhaps was originally superinduced by the fact that prior to the adoption of the constitution liens of this sort, created by state laws, had been enforced by the state courts of admiralty, and as those courts were immediately succeeded by the District Courts of the United States, and in several instances the judge of the state court was transferred to the district court, it was natural, in the infancy of federal legislation on commercial subjects, for the latter courts to entertain jurisdiction over the same classes of cases, in every respect as the state courts had done, without due regard to the new relations which the states had assumed towards the maritime law and admiralty jurisdiction. For example, in 1784 the legislature of Pennsylvania passed a law allowing persons concerned in building, repairing, fitting out, and furnishing vessels for a voyage, to sue in admiralty, as mariners sue for wages Two cases, those of The Collier and The Enterprise, arising under this law, and coming before the Admiralty Court of Pennsylvania, are reported in Judge Hopkinson's works, volume 3, pp. 131, 171. No doubt other cases of the same kind occurred in the courts of other states.

But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity.

It is true that the inconveniences arising from the often intricate and conflicting state laws creating such liens, induced this court, in December term, 1858, to abrogate that portion of the 12th admiralty rule of 1844, which allowed proceedings *in rem* against domestic ships for repairs and supplies furnished in the home port, and to allow proceedings *in personam* only in such cases. But we have now restored the rule of 1844, or rather, we have made it general in its terms, giving to material-men in all cases their option to proceed, either *in rem* or *in personam*. Of course this modification of the rule can not avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel.

It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the states to legislate on the subject seems to be conceded by the uniform course of decisions.

Indeed there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by state laws, until Congress interposes and thereby excludes further state legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of state laws. And yet this exercise by the states of the power to regulate pilotage has not withdrawn the subject, and, indeed, can not withdraw it from the admiralty jurisdiction of the district courts. Cooley v. Port Wardens, 12 How. 299; *Ex parte* McNeil, 13 Wall. 236. And, of course, as before intimated, this jurisdiction of the state legislatures in such cases is subject to be terminated at any time by Congress assuming the control. In some cases this is not so desirable as in others, but in the one under consideration, if Congress has the power to intervene, it is greatly to be desired that it should do so. It would be better to have the subject regulated by the general maritime law of the country than by differing state laws. The evils arising from conflicting lien laws passed by the several states are forcibly set forth by Chief Justice Taney, in the case of The St. Lawrence, before cited. It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages, and a uniform law by which the liens in question should be required within a reasonable time to be placed on record in the custom-house, like mortgages, and otherwise properly regulated, would be of great advantage to the business community.

But there is another mode in which the appellees, if they had a valid lien, could come into the district court and claim the benefit thereof, namely, by a petition for the application of the surplus proceeds of the vessel to the payment of their debts, under the 43d admiralty rule. The court has power to distribute surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated. Schuchardt v. Babbidge, 19 How. 239. The propriety of such a distribution in the admiralty has been questioned on the ground that the court would thereby draw to itself equity jurisdiction. 3 Knapp P. C. 111. But it is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the same. If a case should be so complicated as to require the interposition of a court of equity, the district court could refuse to act, and refer the parties to a more competent tribunal. See cases reviewed in 1 Conk. Adm., pp. 48–66, 2d edit.

In this case the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court, except under the 43d admiralty rule, and in the manner above indicated. Their libel was inadmissible, even under the admiralty rule as recently modified. The John Jay, 17 How. 399. But before the final decree, they filed a petition for the surplus proceeds, and, as there is no question in the case about fraudulent preference under the bankrupt law, they are entitled to those proceeds towards satisfaction of their mortgage.

The decree of the circuit court is reversed, and it is ordered that the record be remanded with instructions to enter a decree in favor of the appellants, in conformity with this opinion.

—MR. SERJEANT BALLANTINE has addressed a letter to the London Times, on the subject of the trial of the Guikwar of Baroda, in which he expresses his intention of resorting to some means of showing how cruelly and unjustly the deposed prince has been treated. Concerning which the Law Times says: 'The example by Dr. Kenealy is not one to be followed by counsel. It is quite sufficient that an advocate should give his client the benefit of his skill in court. It is altogether beyond a barrister's functions to enter upon a paper controversy, concerning the results following the decision of the cause in which he has been engaged. A departure from the long-established rule is likely to have most mischievious results."

Murder—Evidence of Character of Deceased when and for what Purpose Admissible—Threats—Empannelling Jury in Capital Causes.

HORBACH v. THE STATE.*

*The head-notes to this case were prepared by the Attorney-General of Texas.

In the Supreme Court of the State of Texas, May 14, 1875.

Hon. O. M. ROBERTS, Chief Justice.
" GEO. F. MOORE, } Associate Justices.
" T. J. DEVINE, }
" R. A. REEVES, }
" R. S. GOULD, }

1. **Evidence—Character of Deceased.**—In prosecutions for murder, the general character of the deceased may be proved, when it would serve to explain the actions of the deceased at the time of the killing; but the actions it would serve to explain must first be proved, before it can be admissible as evidence, and if no such acts be proved, its rejection is not error. And the same rule applies to evidence of the deceased's habit of carrying arms.

2. **Threats, when Admissible.**—By our code, threats are admissible as independent evidence, without first having established a predicate for their admission, by proof of acts done at the time of the killing, to which they might give additional force; but the effect of such evidence may be subsequently explained away and destroyed by the charge of the court, in the absence of evidence tending to prove such acts.

3. **Evidence of Character of Deceased—Predicate for its Admission.**—In the case of proof of general character of the deceased, there must be a predicate established by evidence already submitted, tending to prove threats of the deceased, or some act done by him at the time of the killing, which it would aid to explain. And when admitted, it would be proper, and not charging upon the weight of the evidence, for the court to explain to the jury the object of its admission, as auxiliary and explanatory of the threats or acts to which it was pertinent, and to be, not of itself, independent evidence of a defence.

4. **Empannelling a Jury.**—In empannelling a jury in a capital case, the names of the persons summoned should be called in the order they stand upon the list, and when found qualified they are to be challenged, either peremptorily or for cause, or accepted severally. No law, or established practice under the law, is known which sanctions the peremptory challenge of a juror by either party in such case, after the juror is accepted and empannelled, whether the jury be full or not; though there may be discretion in the court for excusing or setting aside a juror, after he is thus selected, for good cause shown at the time why he can not, or ought not to serve on that jury.

Mr. Chief Justice ROBERTS delivered the opinion of the court.

The defendant was indicted for the murder of H. K. Thomas, found guilty of murder in the second degree, and his punishment assessed at six years in the state penitentiary.

The facts, necessary to be mentioned to present the errors on the trial complained of, were, that Horbach and Thomas were perfectly friendly up to the time of the difficulty, which happened about 11 o'clock at night in a "sample room" in the city of Dallas, where and when there were present Bogle, one of the proprietors, and Duckworth, the barkeeper, both of whom were behind the counter, and Shock and Wilson, who were outside of the counter, as were also both Horbach and Thomas, both of whom were somewhat intoxicated, and had taken, together with others, two drinks of spirits not long before the difficulty arose. Four of them had just played a game of pool, in which Thomas had lost, and treated the others. Upon asking him his bill of the barkeeper, he was told that he owed for two rounds of drinks, (Horbach being then at the front of the store). Thomas said he owed no such a damned thing The barkeeper said, "All right, Harvey," and Thomas paid for one round of drinks, and said, if any one said he owed for two rounds, he was a damned liar. The defendant then came in singing and dancing, with a watering-pot in his hand, and put it on the counter, when Thomas asked him if he, Thomas, owed for two rounds, and Horbach said "Yes." Thomas said "It is a God damn lie," and taking the watering-pot threw it down violently, and mashed it. Up to this point, there is no material difference in the testimony of the witnesses, but as to the balance there were some differences, which are attributable, partly at least, to two witnesses being behind the counter, and two being in front of the counter. That of the two in front, Shock and Wilson, was most favorable to the defendant, and was, in substance, that Thomas told Horbach, that he was a damned lying son of a bitch, when Shock stepped up and told him that he, Shock, owed for the drinks. Thomas replied, "That is too thin," and told him to go away, and turning to the defendant, told him again, who ever says that he owed for two rounds is a damned lying son of a bitch, at the same time gesticulating violently with his right hand, touching or striking Horbach in the breast. Horbach said, "Then you don't owe it." Thomas again said to Horbach, "You are a damned lying son of a bitch," still gesticulating as before in a violent, angry manner. Horbach, said, "What do you mean?" perhaps twice, Thomas still repeating his accusation and gesticulations, when finally stepping back his right foot, he threw his right hand behind him, pushing back the skirt of his coat (one of the witnesses says as if to draw a pistol), when instantly Horbach presented his pistol with both of his hands, and firing, shot Thomas in the head, and killed him. Shock says, that, being behind Thomas, he was shaking his head at Horbach. Wilson says that, being off to one side, he dodged and sat down, when he saw Thomas put his hand behind him. Bogle says, that during the altercation, he went into the front room, turned down some lights, came back, put some money in the safe, went behind the bar, and was talking to the barkeeper about closing up, when the firing took place, at the south end of the counter, the said witness being at the north end, and the counter being so high that he could not see the movements of the parties' hands in front of it. Shock went for the doctor, Wilson left the house as did the defendant, who was arrested that night in Wilson's room. There was evidence that Bogle and Duckworth were more friendly to Thomas than to Horbach. The doctor came and found no weapons on Thomas, and there was no further evidence as to whether he had weapons or not when he was shot.

There is no intention here to give the least intimation of opinion as to the weight of this evidence, as establishing one conclusion or another, in reference to the guilt or innocence of the defendant. It is collated simply to show that there was evidence tending to prove one of two conclusions, leading to different results, either that Horbach shot Thomas from a sudden motive of revenge, for an unprovoked and gross insult, or under the belief that the gross insult was then followed up, by the act of making a deadly assault upon him with a weapon, endangering his life. The facts tending to the establishment of the latter conclusion (to what extent it is immaterial to consider now) were, that Thomas having a dispute with the barkeeper about his liquor bill, became angry, and without any apparent cause turned the controversy about it from the barkeeper to Horbach. The barkeeper, Shock and Horback all tried to pacify him, and let him have his own version of the matter. Still he persisted in fastening the controversy on Horbach, who was not concerned in it, and was not even present when it commenced. Horbach treated the matter lightly at first, and when all the means that were tried could not divert him from making the issue with Horbach, he commenced treating the matter seriously, and asked Thomas what he meant. Thomas stepped back his right foot, and threw his hand behind him as if to draw a pistol. It may be a significant fact, as tending to show the known character of Thomas, that the persons there, seeing the matter becoming serious, did not interfere, except that Shock, having been once rudely repulsed by Thomas, stood off at some distance, shaking his head at Horbach. This may bear two constructions, either that they did not think it necessary to interfere, or that they did not deem it consistent with their own safety to interfere with Thomas any further than had been done.

For the purpose of adding still further weight to the evidence, tending to the conclusion that Horbach acted under the belief, and had reasonable grounds, from the words and acts of Thomas, then said and done, to believe that Thomas was in the act of making a deadly assault upon him with a weapon, the defendant by his counsel, sought to prove, by questions to witnesses, that Thomas

was in the habit of carrying deadly weapons, and that Thomas, when intoxicated, was a quarrelsome and dangerous man. The questions being objected to, were not allowed to be answered, to which ruling of the court defendant excepted, which appears in bills of exceptions in the record.

The question is, was such evidence admissible for such a purpose as an element of defence?

"Evidence, in legal acceptation, includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. By competent evidence is meant that which the very nature of the thing to be proved requires as fit and appropriate proof in the particular case." The thing sought to be proved in this case is, that Horbach had reasonable grounds to believe, and did believe, that Thomas then intended, and was in act of then attempting, to kill him by the use of a weapon. Now, suppose it to be proved that Thomas, being enraged and pressing the unprovoked quarrel upon Horbach, until it had become serious, and had arrived at a point where Thomas would either have to recede or follow it up with increased malignity, and just at that junction he steps back, and throws his right hand behind him, what other facts would be required, as peculiarly fit and proper to be known by Horbach, to induce that reasonable belief? Certainly, the most fit and appropriate additional facts that he could possibly know, tending to produce such reasonable belief, would be that Thomas had a pistol on his person, back where he put his hand, and that he was a man that would use it when mad and intoxicated, and would not likely back down from a difficulty that he had himself provoked. If Thomas was in the habit of carrying a pistol where he put his hand, it was not improbable that his friend Horbach, as well as others, knew it, and might infer, from the motion of his hand, the intention to draw it; and if his general character was that of a dangerous man, when aroused with anger and excited with drink, Horbach might infer that Thomas intended to use the pistol on him when drawn. On the other hand, if Horbach knew that Thomas' general character was that of a quarrelsome man, with no force of character, not vicious and destructive in his nature, not likely to use weapons, if he had them, and not in the habit of carrying them, then the inference might not be reasonable from his conduct that he intended then to draw and use a pistol. Thus it is shown that these very facts, Thomas' character for violence and habit of carrying arms, with Horbach's knowledge of them, might determine his guilt or innocence, in acting as promptly as he did. His intoxication, his anger, his persistently pressing the difficulty on Horbach without cause, his violent character, and his habit of carrying weapons, would all be appropriate and fit facts, if they existed, to throw light upon, and give significance to his movement in stepping back and throwing back his hand. Taken separately, and in the abstract, they may be meaningless, indifferent and immaterial but taken together, they may be pregnant with meaning, as shown by the conduct of the two witnesses, Wilson and Shock, who saw Thomas' motion of his body, and of his hand. A man's character for violence, dependent upon his irascible temper, overbearing disposition and reckless disregard of human life, is as much a part of himself as his judgment and discretion, his sight or hearing, his strength, his size, his activity or his age, any one of which may become a material fact to give a correct understanding of his conduct, and the intention with which an act is done by him, and are, therefore, part of the *res gestæ*, when pertinent to the act sought to be explained. Their office in evidence is adjective, as auxiliary to a substantive fact to which they are pertinent, and without which they are irrelevant and immaterial. They are helps to the understanding in construing human conduct. The mind can not reject or disregard them. They, and all like helps, ever have been, and ever will be, elements in the formation of belief as to what a man designs by an act to which they are pertinent. Practically we know that men generally, who are assaulted with violence, act, in defending themselves, with promptness and force, in proportion to the violent and desperate character of their assailant. It behooves them so to do for their own safety, because it is known that such men, who usually fight only with weapons, and usually have them ready for use, are not to be trusted to get an advantage in the combat. If, then, the character of the assailant in any case has helped to form a reasonable belief in the mind of the assailed that his life was then in danger, when the act alone would fail to do it, the jury should in some way be informed of the character of the assailant, as well as of his acts, to enable them to understand that the belief was a reasonable one. Otherwise he might act in his defence on such reasonable belief, and the jury, not helped by the knowledge of the assailant's character to understand the import of his acts, of which they were informed, would find him guilty of murder, because of his having acted without reasonable grounds for believing that his life was then in danger, when in fact he had such reasonable grounds of belief, did believe it, and acted on such belief.

This being sometimes an important fact necessary to be known by a jury, to enable them to come to a proper conclusion as to the state of mind of the accused just at the time he killed the deceased, how and under what circumstances is it admissible in evidence? It is laid down as the rule at common law, as practiced in England, and most of the older states of the American Union, that it must be made and appear, if at all, in the transactions immediately connected with the killing as part of the *res gestæ*, as it is termed, and to be deduced therefrom, rather than to be proved as a distinct fact.

In an old settled country, where there is little change of population, this fact would generally be known to a jury, without being proved as a distinct fact; whereas in newly settled countries it might not be. Formerly it was the rule to get jurors; from the vicinage, who knew the parties and the transaction; now the very opposite is the rule. There are various other reasons arising out of the state of society and habits of the people in different countries and at different periods, which would make it important that this fact, when pertinent, should be made to appear as a distinct fact, as explanatory of the acts and intentions of the parties concerned, in order to arrive at the truth.

In an early case in North Carolina, it was said, in speaking of the common law (in a case where it was held that the proof of the character of the deceased for violence was admissible, as a distinct fact), that it is "a system, which adapts itself to the habits, institutions and actual condition of citizens, and which is not the result of the wisdom of any one man in any one age, but of the wisdom and experience of many ages of wise and discreet men." State v. Tackett, 1 Hawks, 217.

In an early case in Alabama, evidence of the general character of the deceased was held to be admissible. Chief Justice Lipscomb (who so long adorned our courts, also, as associate justice), in delivering the opinion, said, in very strong language: "If the deceased was known to be quick and deadly in his revenge of insults, that he was ready to raise a deadly weapon on every slight provocation; or, in the language of the counsel his 'garments were stained with many murders'—when the slayer had been menaced by such an one, he would find some excuse in one of the strongest impulses of our nature, in anticipating the purposes of his antagonist. The language of the law in such a case would be, obey that impulse to self preservation, even at the hazard of the life of your adversary." Quesenberry v. The State, 3 Stewart & Porter, 315-16. In the same case it is said that "there can be no doubt but that when the killing has been under such circumstances as to create a doubt as to the character of the offence committed, that the general character of the accused may sometimes afford a clue by which the devious ways by which human action is influenced, may be threaded, and the truth ob-

tained." These views of the law are quoted and adopted, with numerous reasons for their correctness, by Mr. Justice Lumpkin, in the case of Keener v. The State, 18 Ga. 221, and Monroe v. The State, 5 Ga. 90. In the case of The State of Missouri v. Keene, 50 Mo. 358, the court say, that "when a homicide is committed under such circumstances that it is doubtful whether the act was committed maliciously, or from a well-grounded apprehension of danger, it is very proper that the jury should consider the fact, that the deceased was turbulent, violent and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself." This was said in reversing a conviction for murder, because the court had excluded evidence offered, that the deceased was a quarrelsome, dangerous and desperate man, and in the habit of carrying weapons, as was done in this case. See also The State v. Hicks, 27 Mo. 590.

The same doctrine was announced in the State of Minnesota, in the case of The State v. Dumphey (4 Minn. Rep. 446), and also in the state of California, in the case of The People v. Murray, 10 Cal. Rep. 309. In the case above quoted from Minnesota, it is said: "The character of the deceased *per se*, can never be material in the trial of a party for killing, because it is as great an offence to kill a bad man as it is to kill a good man, or to kill a quarrelsome and brutal man, as it is to kill a mild and inoffensive man. The principle upon which this testimony is alone admitted, arises from some peculiar condition in which the facts of the killing leaves the crime. If the facts, as established, free the case from uncertainty and doubts, and leave the killing an act of premeditated design on the part of the defendant, the quarrelsome character of the deceased can in no manner change the nature of the offence; but if circumstances surround the transaction, which leave the intention of the defendant in committing the crime doubtful, or evenly balanced, or in any manner indicate provocation on the part of the deceased, testimony of the quarrelsome character of the deceased would then become sufficiently part of the *res gestæ* to be admitted to explain or throw light upon the matter." 4 Minn. 445, 446.

It may be deduced from these authorities that the general character of the deceased for violence may be proved, when it would serve to explain the actions of the deceased at the time of the killing; that the actions, which it would serve to explain, must first be proved before it would be admissible as evidence; that if no such acts were proved as it would serve to explain, its rejection, when offered in evidence, would not be error, and that if rejected, when a proper predicate has been proved for its admission, it is held to be error. See Irvin v. The State, decided this term. This results in what has been previously attempted to be developed, that the general character of the deceased for violence should be allowed to be proved, not as a substantive fact, in whole or in part, abstractly constituting a defence, but as auxiliary to, and explanatory of some fact or facts proved to have occured at and in connection with the killing, which tend to establish a defence, when thereby aided, by furnishing reasonable ground for the belief on the part of the slayer, that he is then in immediate and imminent danger of the loss of his life, from the attack of his assailant.

It is observable in most of these cases that it is said that the evidence of character for violence is admissible in a doubtful case. It can hardly be meant by this, that it is admissible only in a doubtful case of guilt. For if that is doubtful, there is no need of proof of character, or any thing else to help out the defence. 1 Whart. Crim. Law, Sec. 644, 7th Ed. The explanation, it is submitted, is, that the person killing is presumed to have committed murder, by the act of killing, and in arraying the facts to establish that he acted in self-defence, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained and construed more favorably for the accused, by adding to it, the proof is admissible. 1 Whart. Crim. Law, sec. 641, and cases cited. The same rule would apply to the proof of the deceased's habit of carrying arms, when pertinent. Ibid.

It would be easy to cite authorities opposed to the admission of such proof upon any condition, or under any circumstances, as part of the defence. 3 Greenleaf, sec. 27 and note; 1 Wharton's Crim. Law, sec. 641, 7th ed. and note. It is obvious, however, that in all the cases where it is not allowed to be proved as a distinct fact, its importance as part of the defence is fully appreciated and acted on by courts and juries, where the transaction at the time of, and connected with the killing develop and bring to light the violent character of the deceased.

Our criminal code provides for the admission of the proof of the general character of the deceased as a violent or dangerous man, when it has been proved that he had previously made threats against the life of the defendant, which threats are declared to be admissible, but "not to be regarded as affording a justification for the offence, unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threat so made." Pas. Dig. Art. 2270. Here the principal object is to provide for the admission of threats, and incidentally thereto is permitted the proof of the violent character of the deceased to give force to them, and both together, when proved, serve only to explain the object of an act done by the deceased at the time of the killing. The main object of this provision of the code, was to settle a long continued controversy in the courts of this state, as to whether previous threats should be admitted at all, and if admitted, what their force and effect should be, and whether or not a predicate should be first established for their admission, by the proof of some act of the deceased, which they would give point to and explain. This affirmative provision for the admission of the proof of the character of the deceased, as a dependent incident to threats that have been admitted to be proved, should not be held to operate as an exclusion of the proof of character, in any and all other instances wherein it might be equally applicable and pertinent. In providing for the admission of previous threats, it simply insured also the admission of that which was necessary to give them their proper weight and force, without prescribing anything either for or against the admission of the proof of the violent character of the deceased, in aid of any other fact besides threats. This provision of the code, it is believed, is a re-enactment of the rules relating to threats, as adopted and practiced as part of the common law in this state before the adoption of the penal code. Lander v. The State, 12 Tex. 474 and 484. If our laws sanction the proof of the violent character of the deceased, in aid of threatening words, it is difficult to see why it should not be equally allowed to be proved in aid and explanation of threatening acts, done by the deceased at the time of the killing.

It is, *secondly*, necessary to go into explanation of the condition of things in this country, which imperatively requires the admission of the proof of the character of the deceased for violence, in order to attain the ends of justice in the administration of the criminal law. It is well and generally known that there are some violent and dangerous men in this country, who are in the habit of carrying pistols belted behind them, and in their pockets, who never think of fighting in any other way than with deadly weapons, who are expert in using them, and who, especially when intoxicated, bring on and press to the extreme of outrage their deadly rencounters, for causes and provocations that would be regarded as utterly trivial by peaceable men; and that if one of such persons, while engaged in an angry altercation, should suddenly step back and rapidly throw his hand behind him, it might readily be understood by those who saw it to mean that he was in the act of drawing a pistol to use it. The same act by one of the great mass of our peaceable citizens who are not in the habit of carrying weapons, would suggest no such thought, and in such case the pistol would have to be drawn and exhibited before any

such thing would be considered, unless there had been some very extraordinary provocation. This state of things is a substantial reality, well known and ostensible to the perception of every one at all familiar with the subject, and men act upon it, and are compelled to act upon it in defending themselves from deadly assaults. It is true the law requires a party killing to act under the responsibility to himself of acting soon enough to save himself from the loss of life or from serious bodily injury, such as mayhem, on the one hand; and, on the other, the risk of firmness and discretion to wait long enough, until some act is done by the deceased at the time of the killing by which the jury trying the case will be satisfied, considering all the surrounding circumstances and parties concerned, that the defendant had reasonable grounds to believe, and did believe, that he was then in impending danger of being murdered, or maimed by his assailant. Pas. Dig., art. 2226. And although the attack may be unlawful and violent, if the act done by deceased indicated a less degree of personal injury than killing and maiming, then before the killing can be fully justified or excused, it must be shown that "all other means were resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." Pas. Dig., art. 2228. This distinction and difference in the rule, as made by our code, depending upon the degree of injury intended by the deceased, as manifested by his acts, are very important practically to be observed. It may avoid repetition by noticing here that this distinction was not properly observed in the otherwise very excellent charge of the court below, which is as follows: "The defendant may also justify himself in the killing by evidence, showing 1st, that the deceased made an unlawful and violent attack upon him; 2nd, that the attack so made was of such a nature as to have produced in the mind of this defendant a reasonable expectation or fear of death or some serious bodily injury; 3rd, that this defendant resorted to all other means to prevent the injury; 4th, that the deceased was killed while in the very act of making such unlawful and violent attack; and unless all four of these propositions affirmatively appear in evidence, the defendant can not be justified on the grounds of an unlawful and violent attack upon his person." The second proposition above quoted is not contained in the article of the code to which the other three relate. Art. 2228, Pas. Dig. By this article 2228, it is intended to provide the rule that, when any other unlawful and violent attack is made than one in which the act of the deceased manifests the intention to murder or maim (or to commit rape, robbery, arson or theft at night), the defendant is required to resort to all other means before killing his assailant, for the prevention of the injury, because in such an attack it is presumed that there may be time and opportunity to resort to other means. But as provided for under the preceding article 2226, where, at the time of the killing, "some act has been done by the deceased, showing evidently an intent to commit such offence" (murder or maiming), then and there, in that event, the party thus attacked need not resort to other means before kiliing his assailant, because it is presumed in such a case that the party's safety depends upon his prompt action in killing his adversary. Thus, when an unlawful and violent assault is committed, the degree and character of injury intended by the assailant, as then indicated by his acts then done, are made the test of whether the party attacked may at once kill his assailant, or must resort to all other means for the prevention of the injury before killing him. This confusion from blending the two rules might have been obviated by giving the 3d charge asked by the defendant's counsel, which was refused by the court only upon the ground that it was deemed to have been "substantially given."

To return to the evidence excluded, it is proper to notice, on account of the intimate relations between threats and the general character of the deceased, that by our code, threats are admissible as independent evidence, without first having established a predicate for their admission by the proof of acts done at the time of the killing, to which they might give additional force, subject to having their effect as evidence subsequently explained away and destroyed by the charge of the court, in the absence of evidence tending to prove such facts. In case of the proof of general character of the deceased, there must be a predicate established by evidence already submitted, tending to prove threats of the deceased, or some act done by him at the time of the killing, which it would aid or give force to, as heretofore explained. And when admitted, it would be proper and not charging on the weight of evidence, for the court to explain to the jury the object of its admission, as auxiliary and explanatory of threats, or acts, to which it was pertinent, and to be not of itself the independent evidence of a defence.

The evidence, exhibited the acts of the deceased at the time of the killing, to constitute a predicate for the admission of the proof, of the general character of the deceased as a violent and dangerous man, and that he was in the habit of carrying weapons, and upon that ground it should have been admitted.

There is also a bill of exceptions in the record by the defendant as to the ruling of the court in the selection of the jury, which recites the facts as follows:

"After the state had passed severally upon Mich. Gray, R. H. Linsey, and James H. Davis, and before said jury had fully been made up, the court permitted the district attorney to challenge each of said jurors peremptorily, and had them to stand aside, to which defendant excepts;" to which the judge annexed the following explanation in giving and signing the bill of exceptions, to-wit: "The ruling of the court was, that the state or defendant could challenge any juror, although accepted, when a new juror was chosen, until their challenges, respectively, were exhausted."

Upon the trial of a capital offence a special *venire facias* is issued for persons, not less than thirty-six, nor more than sixty, for the purpose of forming a jury. Pas. Dig., Art. 3016 and following.

It is further provided that, "in forming the jury, the names of the persons summoned shall be called in the order they stand upon the list, and if present, shall be tried as to their qualifications, and unless challenged shall be empanneled." Pas. Dig., Art. 3004. By this we understand that they are to be challenged either for cause or peremptorily, severally, as each one is determined by the court to be a qualified juror, which is, to be continued one by one until the jury is fully formed to the number of twelve. We know of no law, or established practice under the law, which sanctions the peremptory challenge of a juror by either party, when thus placed on the jury, whether it is full or not. There may be discretion in the court for excusing, or standing aside a juror, after he is thus selected for some good cause, shown at the time why the juror can not, or ought not to serve on the jury. We do not think therefore, that the mode of selecting the jury that was adopted in this case, is warranted by the law of this state.

For the several errors that have been pointed out, and particularly for that of excluding the evidence offered to prove the general character of the deceased for violence, and that he was in the habit of carrying weapons, the judgment must be reversed and the cause remanded. REVERSED AND REMANDED.

Foreign Selections.

THE LIABILITY OF INNKEEPERS.—In this age of travel, the law relating to innkeepers and carriers is of such importance as to be the subject of legislative enactments, and of many reported judgments. Every one, moreover, is interested in knowing the law which protects him and his property in the hotel or railway train; in knowing the extent of the liability of those in whose hands he is for the time being placed, and the amount of caution which is required of himself, in order to make that liability arise. We propose to consider briefly the law relating to the liability of innkeepers. That term, in truth, is known only to the law, for inns and innkeeper, on

this side of the Atlantic, at least, do not exist. The modern hotel, with its comfortless splendor, has taken the place of the old-fash ioned, home-like inn; and "mine host of the Garter" has given way to the "gentlemanly proprietor," who deputes the duties of hospitality to an equally gentlemanlike and courteous clerk.

"Call'st thou me host?
Now, by this hand, I swear I scorn the term."

The chambermaid with cherry-colored ribbons and complexion to match, has been deposed for a sable African, who does nothing for love and very little for money. All things are changed since the days when Calye's case was decided. The law has changed least of all, but even its rigor has been abated in favor of the gentlemanly proprietor.

In 26 Elizabeth, it was resolved *per totam curiam* (of King's Bench) that an innkeeper is bound by law to keep the goods and chattels of his guests without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber-door open; but he ought to keep the goods and chattels of his guests there in safety. And although the guest doth not deliver his goods to the innholder to keep, nor acquaint him with them, yet if they be carried away or stolen, the innkeeper shall be charged; and though they who stole or carried away the goods be unknown, yet the innkeeper shall be charged. The innkeeper may, however, protect himself by requesting the guest to place his goods in a special chamber, where he will warrant their safety, which, if the guest neglect to do, the loss shall be his own. Calye's Case, 8 Coke, 32. Thus it will be seen that in those days the law was severe enough to the innkeeper, deeming it the only way to make the lives and property of travellers tolerably safe. The law, as laid down in Calye's case, is still the law in cases not coming within the act which is hereafter mentioned. It holds the innkeeper liable for the default of himself and his servants, and the result of that and the latter cases may be summed up by saying that where no fault is shown in the guest, and where the loss has occurred through the act of God or the Queen's enemies, default will not be implied in the innkeeper.

There must be no default in the guest who would recover against the inkeeper; and the question now arises what conduct in the guest will amount to default. In other words, what acts of the guest will be considered as contributory negligence, which will relieve the innkeeper from the suspicion of neglect? This is a matter which travellers will do well to make themselves familiar with.

In Burgess v. Clements, 4 M. and S. 306, goods belonging to a factor were lost out of a private room in the inn, chosen by the factor for the purpose of exhibiting them to his customers for sale, the use of which was granted to him by the innkeeper, who at the same time told him that there was a key, and that he might lock the door. This the guest neglected to do, although on two occasions, while he was occupied in showing his goods to a customer, a stranger had put his head into the room. It was held that the guest, by his own conduct, had discharged the innkeeper, partly on the ground that the innkeeper was not bound to extend the same protection to goods placed in a room, used on the request of the guest for the purpose of trade, as in an ordinary chamber, and further, on the ground that circumstances of suspicion had arisen which should have put the guest upon his guard. "After the circumstances relating to the stranger took place, which might well have awakened the plaintiff's suspicion, it became his duty, *in whatever room he might be*, to use at least ordinary diligence, and particularly so as he was occupying the chamber for a special purpose. *For though, in general, a traveller who resorts to an inn may rest on the protection which the law casts around him, yet if circumstances of suspicion arise, he must exercise at least ordinary care.*"

A late case upon the subject is Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515. The plaintiff went to a hotel in Bristol, and while in the commercial room, took from his pocket a bag containing £27, and took from it six pence. He then went to bed, but did not lock or bolt the door, and placed his clothes, the bag of money being in one of the pockets, on a chair at his bedside. He also left his window open. During the night some one entered by the door and stole the bag and money. The judge told the jury to consider whether the loss would or would not have happened if the plaintiff had used the ordinary care which a prudent man might reasonably be expected to have used under the circumstances. The jury found for the defendant, and the court above held that the direction was right, and the verdict warranted by the evidence. Keating, J., said: "There were other circumstances besides the omission to lock the bedroom door. Although the plaintiff did not, when in the commercial room, expose his money, he took the bag out of his pocket to take a coin from it; and it would seem that some one saw where the bag was put, for the thief went direct there. * * * The whole of the facts must be looked at. The only question was, whether there was evidence of negligence on the plaintiff's part which contributed to the loss. I think there was." Montague Smith, J., said: "I agree that there is no obligation on a guest at an inn to lock his bedroom door. * * * But the fact of a guest having the means of securing himself, and choosing not to use them, is one which, with the other circumstances of the case, should be left to the jury. The weight of it must, of course, depend upon the state of society at the time and place. What would be prudent at a small hotel, in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol, where probably three hundred bedrooms were occupied by people of all sorts." Willes, J., referred to such a circumstance as there being races in the neighborhood as one which would entail greater caution upon the guest. See also Cashell v. Wright, 6 E. & B. 89, where it is laid down broadly that the rule of law resulting from the authorities is, that the goods remain under the charge of the inn-keeper and the protection of the inn, so as to make the inn-keeper liable, as for breach of duty, *unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.* In these cases then, though it is of course impossible to frame a definition of contributory negligence, the general rule may be found for the conduct of the judicious traveller; and we may even deduce three cardinal rules which the traveller will do well to bear in mind—rules which are consonant with common sense, and are therefore adopted by the law:

1. Under any circumstances lock your bedroom door when you go to bed.

2. Do not make a display of your money in public places, such as the commercial-room or the bar of the house.

3. Consider whether there are not special circumstances, calling for special caution on your part.

These are rules which, in truth, the man of ordinary prudence will adhere to without legal advice, and the man of ordinary prudence is one whom the law loves. We have said that the law as indicated in the decisions cited, applies to cases which do not fall within the Inn-keepers' Act. We now come to consider that enactment. It is 37 Vic. c. 11, of Ontario statutes, and is taken from an imperial statute passed in 1863, which seems to have been enacted on account of the judgment in Morgan v. Ravey, 6 H. & N. 265. That case decided that a default would be presumed in the inn-keeper in every case, where the loss did not arise from the plaintiff's negligence, the act of God, or the queen's enemies. This was a just exposition of the law as it then stood, and as it seemed to bear somewhat hardly upon the inn keeper, the imperial act to *amend* the law was passed.

The statute (sec. 2) enacts that no inn-keeper shall be liable to

make good to a guest any loss of, or injury to *goods or property brought to his inn*, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than $40, except,

1. Where such goods or property shall have been stolen, lost, or injured through the *wilful act, default, or neglect* of such inn-keeper or any servant in his employ, or,

2. Where such goods or property, shall have been deposited expressly for safe custody with such inn-keeper, who may require as a condition of his liability, that such goods or property *shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.*

Inn-keepers who refuse to receive goods for deposit, or who neglect to provided place of deposit, or who neglect to expose a printed copy of section 2 in the manner pointed out, are disentitled from claiming the benefit of the act. It will be observed that the liability of the inn-keeper will still be determined by the common law in several cases. 1. Where the property in question is a horse, etc.; 2, in any case up to $40; 3, where the inn-keeper refuses or neglects to provide a place of deposit; or, 4, where he has not posted up a copy of the 2nd section of the act. We think we may venture to suggest another important exception from the act, though there have been no decisions upon it, either in our own or the English courts. The goods or property referred to, do not seem to include personal clothing, jewelry, usually worn upon the person, or such money as a traveler ordinarily carries about him. When it is considered that most losses incurred by travellers are of this sort, the exception, if we are right in deeming it to be so, will appear to be a very material one. An act of similar import is in force in the state of New York. The substance of the first section is, that the hotel-keeper shall not be liable for loss of money, jewels, ornaments or valuables, when he shall have provided a safe for the custody of such property, and shall have posted a notice to that effect in the room occupied by the guest, and the guest shall have neglected to deposit such property in the safe. In a case upon this act, plaintiff lost his watch with chain attached, a gold pen and pencil case, and $25 in money. It was found that the sum lost was all reasonable and necessary for travelling expenses. The court said: "I think it is plain that the exemption was intended to apply only to such an amount of money, or to such jewels or ornaments or valuables as the landlord himself, if a prudent person, and travelling, would put in a safe, if convenient when retiring at night. Can any one suppose that it was the intention of the act to exempt the hotel proprietor from this common law liability, unless the traveller emptied his pockets of every cent of money, and deposited it, with his watch and pencil case in the safe, both of which last mentioned articles he might have occasion to use after retiring to his room? This would be not only exempting hotel keepers from their common law extraordinary liability, but requiring extraordinary prudence of their guests. * * The watch and pen and pencil case are certainly valuables, and might be called jewels, but I think should be considered a part of the traveller's personal clothing or apparel. The legislature did not expect the traveller, after retiring, to send down his ordinary clothing or apparel, to be deposited in the safe." Giles v. Libby, 36 Barb. 70. It has also been held in Louisiana, that the inn-keeper will be liable for the necessary baggage of the traveller, his watch and personal effects, and for money which he has about him for his personal use, when stolen, notwithstanding a regulation of the inn requiring travellers to deposit certain articles of value in the safe. Pope v. Hall, 14 La. Ann. 324. The language of our own act, and the force of the very common sense reasoning used in Giles v. Libby, just cited, inclines us to think that when it becomes necessary to decide the point, our courts will put a construction on the act similar to the interpretation of the New York statute by the supreme court of that state —[*The Canada Law Journal.*

Correspondence.

CONTRACTS IN AID OF PROSTITUTION.

NEW YORK, June 17, 1875.

EDITORS CENTRAL LAW JOURNAL:—A late number of the Journal (*ante*, p. 338), contains some comment upon a decision in one of the Louisiana Annual Reports, holding that a prostitute could not set up as a defence to an action for the price of furniture, that it was used for an immoral purpose—or for the facilitating of an immoral purpose. I beg to call your attention in this connection to the case of Lloyd v. Johnson, B. & P. 340, where Buller, J. made a very nice distinction, namely: "Where an action was brought for the charges of washing a variety of expensive dresses and numerous gentlemen's nightcaps, and it appeared that the dresses were used by the defendant for the purpose of enabling her to decoy gentlemen to her bed, and the nightcaps for those gentlemen to sleep in when she got them there, and the plaintiff was aware of the uses to which the dresses and nightcaps were applied, it was held that the plaintiff was nevertheless entitled to recover for the washing. 'This unfortunate woman' (the defendant), observes Buller, J., 'must have clean linen, and it is impossible for the court to take into consideration which of these articles were used for an improper purpose, and which were not.'"

So, too, in Crisp v. Churchill, cited in that same case, it was held that if the prostitute rents a house to live in, and plies her trade elsewhere, her trade is no is sound, although the judge's reasoning, as your correspondent cites it, is apdefence for an action for the rent of the house. The decision in the La. An. parently not. I suppose that the woman could not take advantage of her own wrong in the premises.

Yours, etc., J. A. M.

THE NEW HAMPSHIRE ELECTION CASE.

ANDOVER, N. H., June 16, 1875.

EDITORS CENTRAL LAW JOURNAL:—In the last number of the LAW JOURNAL, in an article headed "The New Hampshire Election Case," is the following: "Mr. Heard clearly appears to have been the choice of the people, and no man possessing a particle of shame would occupy his rival's seat under the circumstances."

It is evident from the above, that you supposed when you wrote the article, that Natt. Head, whose full christian name is Nathaniel, received more votes at the last annual election in this state than did James Priest who now occupies the seat which you mistakenly call his "rival." But in senatorial District No. 2, (Mr. Head's district) by the returned copies of the records on file in the office of the secretary of state, it appears that the whole number of votes cast was 7,706.

Of which Joseph Petticrew had,	1
Arthur Deering,	3
Scattering,	3
Joshua C. Merrick,	95
Natt. Head,	3,771
James Priest,	3,834

From the above statement it appears that Priest received 63 more votes than Head, and in view of that fact, how is it that "Mr. Head clearly appears to have been the choice of the people?"

In justice to the readers of the LAW JOURNAL, who, at least in New Hampshire regard it as among the ablest, fairest and best legal publication in the United States, and in justice to Mr. Priest, who is a man of honor, and would not occupy the seat as senator which he now does did he not think it his duty to do so, you ought to correct your error in relation to this matter; and allow me to add, I am confident you will.

Yours truly, GEORGE J. CARR.

[We will. We derived our information from the political journals, and were misled by the language in which they discussed the question.—Ed. C. L. J.]

Some Recent Decisions in Bankruptcy.

FAILURE TO ENTER OPPOSITION TO DISCHARGE AT MEETING CALLED FOR THAT PURPOSE, CURED BY SHOWING WANT OF NOTICE.

In re Chauncey I. Filley. U. S. Cir. Ct. E. D. Mo., Apr. 1, 1875. Dillon, J. Harvey Filley, a citizen of Philadelphia, after the meeting of creditors to consider the application of the bankrupt for his discharge, filed his petition in the district court, showing that he was a creditor of the bankrupt for a large amount; that he had duly proved his claim long before said meeting was called, but that he had failed to receive any notice of such meeting; and praying that he might be allowed to enter opposition to the discharge, and file specifications of his objections thereto. The district court dismissed the petition, and on petition for review in the circuit court, the following order was made:

1. At the election of said bankrupt, a further preliminary enquiry may be had, as to whether the said Harvey Filley did actually receive the notice for the meeting called for August 5, 1874, prior to the said 11th day of August, 1874, or knew, prior to the eleventh day of August, of said application for discharge being made, and having been set for hearing. Upon this, preliminary proof may be taken, under the direction of the district court. If such proof show to the satisfaction of the district court, that the said Harvey received such notice, or knew of said meeting prior to August 11th, the refusal of his application to oppose said discharge is to stand affirmed. If otherwise, said Harvey Filley is to be allowed to oppose said discharge, and his formal specifications of grounds of opposition to be filed when the district court shall direct.

2. If said bankrupt waives this preliminary enquiry, said specifications are to be filed with all convenient speed, and the said Harvey Filley is to be allowed to enter his opposition to the discharge, but this order is not to be construed to open the discharge as to any other creditors.

Summary of Our Legal Exchanges.

THE WEEKLY REPORTER.*

London: *Edward J. Milliken, 12 Cook's Court, Casey St., W. C.

Sale Under Decree — Opening Biddings — Reserved Price fixed by Trustee, being also Agent of Purchaser — Fraud or Improper Conduct in Management of Sale. 30 and 31 Vict. c. 48, s. 7.—Delves v. Delves, Chancery Court, before Vice Chancellor Malins. [23 W. R. 499]. On a sale under a decree in an administration suit, a trustee of the testator's will joined with the auctioneer in fixing £3,000 as the reserved price of a lot; and this was the fair market value of the lot. The trustee was the agent of the person who was the only bidder, and purchased at the reserved price. Before the sale, the trustee told his employer that he ought to buy the property, and that £3,000 was a fair price, but he did not tell him that this was the reserved price. After the sale, an adjoining proprietor offered £4,000.

Held, that the court was not warranted in opening the biddings.

Goods Sold by Sample — Rejection by Purchaser — Duty to Return.—Grimoldby v. Wells, Court of Common Pleas. Opinions by Lord Coleridge, Ch. J., Brett, J., and Denman J. [23 W. R. 524.] Where goods are sold by sample, and on delivery are found not up to sample, the purchaser may reject them by giving notice within a reasonable time that he does so, and that they are at the vendor's risk. Under such circumstances, the purchaser is not bound actively to return them. Couston v. Chapman, L. R. 2 Sc. App. 250 discussed.

Expectant Heir — Mortgage of Reversion — Unconscionable Bargain.— Beynon v. Cook, Chancery Court, before James and Mellish, Lords Justices of Appeals. [23 W. R. 531.] B., a younger son, twenty-six years of age, and in great pecuniary distress, in July, 1861, borrowed £85 of a money-lender on his promissory note for £100 at six months, and as a collateral security mortgaged a bond for £600, payable on the death of his father (then aged fifty four), which he had taken from his eldest brother as consideration for his releasing his portion of £600 charged on the family estate. The interest reserved by the mortgage in the event (which happened) of the note not being paid when due, was five per cent. per month. B. died in October, 1871, his father died in October, 1873, whereupon the bond became payable, and in February, 1874, B.'s executrix filed her bill, praying that the securities might be delivered up, upon payment of the amount advanced, with interest at such rate as the court should think fit. *Held*, that B. was an expectant heir, that the bargain was unconscionable, and that the securities must be delivered up upon payment of the amount advanced, with interest of five per cent. per annum. Decision of the master of the rolls affirmed.

ADVANCE SHEETS OF 55 N. H. REPORTS.*

Statute of Limitations—Adverse Possession of Chattels.— Baker v. Chase [55 N. H. 61.] Opinion by Ladd, J.—1. In order that the title to a personal chattel pass by operation of the statute of limitations, there must at least be some use or appropriation of it, or some act of dominion over it, inconsistent with an absolute right of property in the owner, and such as would lay the foundation of an action for its recovery. 2. In 1861 the plaintiff bought a piece of land on which were lying some split stones the property of the defendant. For more than six years the stones were not moved by either party, and no claim of ownership in them was asserted by either to the other. *Held*, that the title to the stones did not pass to the plaintiff by virtue of the statute.

*Courtesy of John M. Shirley, Esq., Andover, N. H., Reporter.

Legal News and Notes.

—THE Law Times says that the select committee appointed by the House, of Commons, to consider the method of framing acts of parliament, is eliciting opinions which point out the evils of the existing system, if they are not altogether satisfactory as suggesting possible reforms. The first witness called, Mr. Bouverie, considers that there is little hope of any improvement taking place in the drafting of bills. In the first place, he says, legislation is too rapid; and in the next place, he says that ability to put a new bill into clear language is a rare accomplishment—"it is an extremely difficult thing for a layman to do it, and it is rare even to find a professional draftsman, who has such a knowledge of the construction of the English language as to express legal ideas clearly and well."

—AT the last meeting of the St. Louis bar association, the case of James A. Beal, who a few days ago was ordered by the court to pay the costs in a divorce suit he was conducting in a somewhat irregular manner, was taken up, and a resolution passed for the appointment of a committee to take legal steps to have him disbarred from practicing as an attorney. Judge R. E. Rombauer presented a printed advertisement of Henry Gambs, late public administrator, announcing his resumption of the practice of law in this city. On motion of Judge Rombauer, a committee was appointed to ascertain whether Mr. Gambs was regularly enrolled as an attorney, and if so, to take the necessary steps to have him disbarred from practice. It will be remembered that Mr. Gambs is the person who, as public administrator, became a defaulter in a large sum and fled the city. But it seems that he has returned and hung out his shingle as a practicing attorney.

—IN the protracted case of Carl Vogt, Mr. District Judge Blatchford, sitting in the United States Circuit Court for the Southern District of New York, has decided that in an extradition case no one can revise the opinion of the commissioner except the President. If the President should be of opinion that the evidence taken before the commissioner was not sufficient to sustain the charge, then it would be his duty to withhold the warrant of extradition. If he should be of opinion that it was sufficient, then it would be his duty to grant the warrant. The learned judge, therefore, declined to express an opinion on the sufficiency of the evidence upon the hearing before the commissioner, and the prisoner was remanded to the custody of the marshal. The counsel of Vogt then obtained a writ of *habeas corpus* from a judge of the New York Supreme Court, with a view of raising some other question in the case. But this last effort was not successful; and Carl has sailed for Europe in charge of a detective.

—SWALLOWING A WRIT.—In Manning and Bray's "History of Surrey" we find the following strange story, with a voucher for its truth. In Newington church is buried Mr. Serjeant Davy, who died in 1870. He was originally a chemist at Exeter; and a sheriff's officer coming to serve on him a process from the court of common pleas, he civilly asked him to drink; while the man was drinking Davy contrived to heat a poker, and then told the bailiff that if he did not eat the writ, which was of sheepskin and as good as mutton, he should swallow the poker! The man preferred the parchment; but the court of common pleas, not then accustomed to Mr. Davy's jokes, sent for him to Westminster Hall, and for contempt of their process committed him to the Fleet Prison. From this circumstance, and some unfortunate man he met there, he acquired a taste for the law; on his discharge he applied himself to the study of it in earnest, was called to the bar, made a serjeant, and was for a long time in good practice.—[*Irish Law Times.*

—A STRIKING illustration of the fallibility of the Court of Exchequer Chamber is afforded by a case which was before the house of lords on the 9th inst. The case also shows that the judges of the intermediate court of appeals are disinclined to learn, or to apply, the doctrines of equity, however plain or however controlling they may be. A person who held certain shares in the Shropshire Union Railway Company, as trustee of the company, in breach of the trust, transferred them to one Robson, on whose death his executrix applied to have the shares transferred into her name. The company refused, on the ground that the shares were their property. On application to the Court of Queen's Bench on a *mandamus*, and on a special case being stated, that court decided in favor of the company. The executrix appealed, and the Court of Exchequer Chamber unanimously reversed the decision of the Court of Queen's Bench. This unanimous court of appeal has now had the satisfaction of learning from Lord Cairns that the case was very simple, and could hardly admit of argument. His lordship said, and with most admirable candor, "unless the whole of the well-known system of trusts in this country was to be held applicable only to the case of infants, married women and persons with limited interests, the decision of the Court of Exchequer Chamber could not be upheld"—[*Law Times.*